"We Inherit an Old Gothic Castle"

By ROBERT LEE STONE*

Commentaries on the Laws of England, by William Blackstone. Chicago: University of Chicago Press. 1979, 4 vols.: Vol. 1, pp. xiii + 473; Vol. 2, pp. xv + 520, appendix; Vol. 3, pp. xii + 455, appendix; Vol. 4, pp. xvi + 436, appendix, index & supplement. $35.80.

In 1979, the University of Chicago Press published a paperback edition of Judge William Blackstone's *Commentaries on the Laws of England*[1] in a facsimile reproduction of the first edition of 1765-1769. This event, which appears to be of interest only to historians, may have a profound impact on the study of constitutional law in the United States.

On the one hand, Judge Blackstone intended his work to be read by the educated layman as an introduction to principles of law as they appear in all civilized countries, and especially as they appear in the common law, which forms the underpinnings of much of American constitutional law. To encourage a wide readership, the *Commentaries* were written in an interesting style, accessible not only to the historian but to all liberally educated persons.

On the other hand, the *Commentaries* are of immense scholarly importance. First, one cannot understand the meaning of a statute without a knowledge of its common-law background and the intent of its drafters. Second, the Framers of the Constitution of the United States considered Judge Blackstone to be both a teacher of timeless jurisprudence and the author of the best practical guide to the law. The Americans in 1776 revolted not against British law but against George III, in the name of the true British

* B.A., 1969, Stanford University; M.A., 1972, Columbia University; Ph.D., 1978, University of Chicago; Instructor, Department of Political Science, Rosary College, River Forest, Illinois.

1. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 (1979).

constitution. For the Framers, the importance of Judge Blackstone as the interpreter of that constitution is difficult to overestimate, and, as Blackstone points out, "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made . . . . "[2]

One distinguished nineteenth century commentator[3] has noted that:

> In spite of popular disbelief, it is the philosophical thinker who regulates the form of the state. He works out a civil economy, which, corrected by popular experience, at last becomes the form of government in the state. . . . [For Americans, the most influential thinkers are Montesquieu and Blackstone.] In so far as [the Americans] departed from colonial experience, they show the influence of Montesquieu. His *Spirit of the Laws* was published in 1748, and its influence on America was like that of Aristotle's *Politics* on the institutions of Europe. . . . Twenty-five years later than Montesquieu's *Spirit of the Laws,* appeared Blackstone's *Commentaries*—destined at once to become the principal legal text-book of the English race. . . . The best of their political speculations became the common intellectual property of thoughtful Americans, and in political form were incorporated in the constitutions of the eighteenth century, and, slightly modified, are found in all that have been adopted since. . . . Montesquieu was speculative; Blackstone, practical and definitive. The *Commentaries,* as did no other book, assisted American statesmen in giving legal form to democratic ideas of government.[4]

The first American edition, published in Philadelphia by Robert Bell in 1771, contains a list of its subscribers. This list includes the names of eight members of the Constitutional Convention of 1787.[5] In 1775, four years after publication of the first American edition, Edmund Burke reported to Parliament that about as many copies of the *Commentaries* had been sold in America as in England in the ten years since the publication of the first edition.[6]

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2. 1 W. BLACKSTONE, *supra* note 1, at 59.
3. 1 F. THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE (1898).
4. *Id.* at 38-41.
5. *Id.*
6. "I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, have so many books as those on law [been] exported to the Plantations. . . . [T]he Colonists have now fallen into the way of printing them for their own use. . . . I hear that they have sold nearly as many copies of Blackstone's Commentaries in America as in England." Archives, 4th Ser., I, 1754, *quoted in* 2 W. CROSSKEY, POLI-

Indeed, the first American edition sold 1400 copies in advance.[7]

A few examples of Judge Blackstone's influence on the Framers of the Constitution of the United States include the following. His advocacy of the doctrine of "separation of powers"[8] is persuasive.[9] His writings on the importance of the writ of *habeas corpus*[10] and of a free press, and his disavowal of all prior restraints[11] on the press, contributed to the establishment of these fundamental constitutional rights on American shores.[12] Similarly, the Framers assumed general familiarity with Blackstone's discussion of the nature of "the executive power" when they drafted article II. Likewise, Blackstone teaches that the rule of law *per se* requires the supremacy of the legislative branch of government.[13] Moreover, Judge Blackstone's elucidation of the principles of sovereign immunity[14] gained wide currency among the various colonies and became a part of American law.[15] Additionally, the stress Blackstone places on natural law and natural rights[16] helped inspire the Amer-

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TICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1326-27 (1953).

7. WARREN, HISTORY OF THE AMERICAN BAR 178 (1911).

8. "[W]herever these two powers [the power to make and the power to enforce the law] are united together, there can be no public liberty." 1 W. BLACKSTONE, *supra* note 1, at 142.

9. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 264 (1980).

10. "[T]he famous *habeas corpus* act, 31 Car. II.c.2. . . . is frequently considered as another *magna carta* of the kingdom." 3 W. BLACKSTONE, *supra* note 1, at 135.

11. "The liberty of the press is indeed essential to the nature of a free state: . . . this consists in laying no *previous* restraints upon publications . . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press . . . . To subject the press to the restrictive power of a licensee . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." 4 W. BLACKSTONE, *supra* note 1, at 151-52 (emphasis in original).

12. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 280-82 (13th ed. 1973); T. NORTON, THE CONSTITUTION OF THE UNITED STATES 199 (23d ed. 1962). Corwin called Blackstone "the oracle of the common law when the First Amendment was framed." E. CORWIN, *supra*, at 281.

13. "[I]f the parliament will positively enact a thing to be done . . . I know of no power that can control it." 1 W. BLACKSTONE, *supra* note 1, at 91. As Blackstone explains in a later edition of the *Commentaries*, "no power" means "no power in the ordinary forms of the constitution that is vested with authority." This qualification implies a right of revolution if the legislature should persist in tyrannical acts. But the constitutional right of judges to disobey clear statutes is utterly denied. "[F]or that were to set the judicial power above that of the legislature, which would be subversive of all government." *Id.*

14. 1 W. BLACKSTONE, *supra* note 1, at 234-36.

15. U.S. CONST. amend. XI; Hans v. Louisiana, 134 U.S. 1 (1890); United States v. McLemore, 45 U.S. (4 How.) 286 (1846). *See also* THE FEDERALIST No. 81 (A. Hamilton).

16. "This law of nature, being co-eval with mankind and dictated by God himself, is of

ican Revolution and greatly influenced later judicial interpretations of the Constitution.[17]

But not all editions of Judge Blackstone's work are of equal value to the student of Constitutional law. Successive editions of the *Commentaries* were revised to adapt to changes in British law. One example of the importance of the first edition involves the Supreme Court's interpretation of the arrest clause in article I,[18] which states that congressmen shall be privileged from arrest in all criminal and civil cases, except for "Treason, Felony and Breach of the Peace." This privilege is an ancient right developed by Parliament in its struggle with the English monarchs. "Treason, Felony and Breach of the Peace" is a traditional or technical phrase from the common law and is explained by Judge Blackstone in the first edition.[19] Then King George III, in reaction to the famous *Wilkes's Case,*[20] pushed through a reform which abolished this ancient parliamentary immunity.[21]

While later editions of Blackstone dutifully reflect George III's changes, the first edition, read by the Framers, did not include them. And the Constitution of the United States preserves the arrest privilege as part of the system of checks and balances—the "separation of powers."[22]

In 1907, however, the Supreme Court of the United States abridged the protection provided by this clause[23] and declared, in effect, that the arrest clause was obsolete.[24] The Court relied in part on the 1902 Lewis edition of Blackstone.[25] If the original edi-

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course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." 1 W. BLACKSTONE, *supra* note 1, at 41.

17. C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 38-39, 56-58 (1965).

18. U.S. CONST. art. I, § 6, cl. 1.

19. 1 W. BLACKSTONE, *supra* note 1, at 159-61.

20. King v. Wilkes, 95 Eng. Rep. 737 (K.B. 1763).

21. "An Act for the further preventing delays of Justice by Reason of Privilege of Parliament," 10 Geo. II, c.50.

22. U.S. CONST. art. I, § 6.

23. *See* Williamson v. United States, 207 U.S. 425 (1908). *See also* Long v. Ansell, 293 U.S. 76 (1934) (nonenforcement of the arrest clause in civil cases).

24. 207 U.S. at 446. *See also* LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (E. Corwin ed. 1953).

25. *See* Williamson v. United States, 207 U.S. 425, 439-40 (1908), discussing W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (W. Lewis ed. 1902).

tion had been more readily available, it is conceivable that the Supreme Court might have interpreted the Constitution in accordance with the intent of the Framers rather than in accordance with the reforms of the "despot," George III.

The Supreme Court has cited the *Commentaries* in other cases which have required an examination of the common-law background of various constitutional guaranties. In *Patterson v. Colorado*,[26] the Court cited Blackstone's discussion of criminal-libel laws[27] to illustrate the broad scope of the freedoms of speech and of the press guaranteed by the First Amendment.[28] In 1972, Justice Stewart relied on the *Commentaries* in drawing the critical distinction between property rights and personal liberties in interpreting the scope of the due process clause.[29] More recently, the Court has considered Blackstone's discussion[30] of the Parliamentary precursor to the speech or debate clause[31] in considering the purpose of absolute congressional immunity in *Hutchinson v. Proxmire*.[32] In fact, a survey of cases decided by the United States Supreme Court reveals that 210 of the Court's opinions referred to the *Commentaries* for explication of common-law principles. These cases include such important recent constitutional decisions as *Richmond Newspapers, Inc. v. Virginia*,[33] *Payton v. New York*,[34] *Gannett v. DePasquale*,[35] *Bell v. Wolfish*,[36] and *Rakas v. Illinois*.[37]

Before turning to other examples of how a knowledge of the *Commentaries* is helpful in correctly interpreting the Constitution, a brief sketch of this "practical and definitive" work is in order. The *Commentaries* is an encyclopedic statement of the common law, consisting of 1,884 pages divided into four volumes reflecting

26. 205 U.S. 454 (1907).

27. 4 W. BLACKSTONE, *supra* note 1, at 150.

28. 205 U.S. at 461-62. *Patterson* is discussed in E. CORWIN, *supra* note 12, at 281-83. *See also* Justice Frankfurter's discussion of the roots of the First Amendment in Dennis v. United States, 341 U.S. 494, 519-23 (1951) (Frankfurter, J., concurring) (citing the *Commentaries* at 523 n.4).

29. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972), *citing* 1 W. BLACKSTONE, *supra* note 1, at 138-40.

30. 1 W. BLACKSTONE, *supra* note 1, at 164.

31. U. S. CONST. art. I, § 6, cl. 1.

32. 443 U.S. 111 (1979).

33. 448 U.S. 555, 569 (1980).

34. 445 U.S. 573, 590 (1980).

35. 443 U.S. 368, 386 (1979).

36. 441 U.S. 520, 570 (1979) (Marshall, J., dissenting).

37. 439 U.S. 128, 143 (1978).

the four main divisions of the law: the law commands what is right and prohibits what is wrong, for "persons" as well as for things, both in public and in private. The four volumes are: *Of the Rights of Persons*[38] (constitutional law); *Of the Rights of Things*[39] (the law of property and contracts); *Of Private Wrongs*[40] (the law of torts and civil procedure); and *Of Public Wrongs*[41] (criminal law).

Volume I, *Of the Rights of Persons*, is the most important of the four volumes for it provides an overview of constitutional government which is the fountainhead of all liberty. Blackstone introduces his work with an address to gentlemen and to lawyers, because no man is worthy to consider himself a gentleman or a liberally educated person without knowledge of the law, and because no man without a liberal or classical education can truly understand the law.

What is "the law"? The law is both a rule of action dictated by some superior being[42] and that which accords with natural justice. On the one hand, the law is whatever the supreme legislature says it is. "Municipal law is a rule of civil conduct prescribed by the supreme power in a state."[43] "If the [supreme legislative authority] will positively enact a thing to be done which is unreasonable, I know of no power that can control it."[44] To avoid the horrors of the "state of nature"[45] where men are equal but where life is nasty, poor, brutish and short, men form a "contract of society."[46] "The only true and natural foundations of society are wants and fears. . . . [The true] end of civil society [is] peace and security."[47] The ugly truth is that the human species is by nature frail, cowardly, and unreasoning.[48] Blackstone saw that the "right of conquest" was allowed by the "law of nations"[49] and that the sanc-

38. 1 W. BLACKSTONE, *supra* note 1 (*Introduction* by Stanley N. Katz).
39. 2 W. BLACKSTONE, *supra* note 1 (*Introduction* by A.W. Brian Simpson).
40. 3 W. BLACKSTONE, *supra* note 1 (*Introduction* by John H. Langbein).
41. 4 W. BLACKSTONE, *supra* note 1 (*Introduction* by Thomas A. Green).
42. 1 W. BLACKSTONE, *supra* note 1, at 39.
43. *Id.* at 53.
44. *Id.* at 91.
45. *Id.* at 43.
46. *Id.* at 47.
47. 2 W. BLACKSTONE, *supra* note 1, at 15.
48. 1 W. BLACKSTONE, *supra* note 1, at 41-43.
49. *Id.* at 101. The law of nations is governed by the rules of natural law *"quod naturalis ratio inter omnes homines constituit"* (which natural reason constitutes among all men). *Id.* at 43.

tions inherent in this natural law were at best "imperfect." Thus, "there is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority in which the *jura summi imperii,* or the rights of sovereignty, reside."[50]

On the other hand, those who would presume that Judge Blackstone is a "positivist," that is, one who believes that the law is only that which the ruling class says it is, misconstrue the whole of Blackstone's thought by analyzing only certain parts of the *Commentaries.*[51] Blackstone teaches that the law has two aspects—power and wisdom[52]—and that it is both rational and natural. This does not mean, of course, that one should accept all positive laws as rational and natural. It means that a law which is unreasonable or unnatural is not, strictly speaking, a law. The laws of men are like "the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature."[53] The sovereign has free will, but that will is properly exercised only in accordance with the "immutable laws of human nature." So a sovereign attempting to make laws which are contrary to the immutable laws of human nature will have no more success than will an architect who ignores the law of gravity; his project will inevitably fail. The law of nations depends entirely upon the rules of natural law: "[W]e should live honestly, should hurt nobody, and should render to every one it's [sic] due; to which three general precepts Justinian has reduced the whole doctrine of law."[54] Furthermore, Blackstone noted that "*the law,* and the *opinion of the judge* are not always convertible terms."[55] "For if it be found that [a] decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law.*"[56] When there is a conflict between natural and positive law, one should therefore obey the higher law:

> This law of nature, being coeval with mankind . . . is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or imme-

50. *Id.* at 49.
51. *See, e.g.,* Katz, *Introduction* to 1 W. BLACKSTONE, *supra* note 1, at vi.
52. 1 W. BLACKSTONE, *supra* note 1, at 40.
53. *Id.* at 38.
54. *Id.* at 40 (footnote omitted).
55. *Id.* at 71 (emphasis in original).
56. *Id.* at 70 (emphasis in original).

diately, from this original.[57]

In recognizing the existence of a higher law, Blackstone breaks decisively from Hobbes, moderating the poisonous effects of Hobbes' precept that the law is the will of the sovereign.[58]

Blackstone, like Hobbes, is correct in saying that all regimes do and must have one sovereign, one supreme legislator. "[A]ll the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end."[59] And, like Locke, Blackstone makes explicit that this doctrine does not mean that absolute monarchy is the best form of government. On the contrary, monarchies are powerful but usually are neither wise nor morally good, while aristocracies are wise but usually are not morally good. Democracies are morally good but usually are neither wise nor powerful. The best form of government, then, is a mixed regime which includes elements of all three basic forms and can therefore hope to enjoy a commingling of the virtues of all three. Indeed, Blackstone goes so far as to assert that good government, within the confines of the separation of powers necessary to sustain a mixed regime, requires not executive, but parliamentary supremacy.[60] Accordingly, judicial review is contrary to the principles of good government.

> I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.[61]

Concerning this common law, Blackstone indicates that it is far more complex than simply "judge-made law" or "the law of England."

> [The *lex non scripta*] . . . [t]his unwritten, or common, law is properly distinguishable into three kinds: 1. General customs;

57. *Id.* at 41.
58. *See generally* T. HOBBES, LEVIATHAN (1651).
59. 1 W. BLACKSTONE, *supra* note 1, at 49.
60. *Id.* at 142.
61. *Id.* at 91.

> which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs, which for the most part affect only the inhabitants of particular districts. [And] 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.[62]

Blackstone, it is obvious, employs the term "common law" in two different senses: law common to the whole kingdom and any law, general or local, which was followed on the basis of custom.[63] The first branch of the common law, the "general customs, or the common law, properly so called . . . is that law, by which proceedings and determinations in the king's ordinary courts of justice [the Chancery, the King's Bench, the Common Pleas and the Exchequer] are guided and directed."[64] The second branch consists of local exceptions to the kingdom-wide law by which, "for reasons that are now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs" with respect to land tenure, trade and other matters.[65] "The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions . . . , [that is,] the civil and canon laws."[66] While Blackstone concedes that these are written laws, they are nontheless part of England's "common" or customary law because "their reception in general . . . [is] grounded intirely upon custom; corroborated in the latter instance by act of parliament . . . ."[67]

It is clear, then, that there is a considerable diversity within the common law, even in England. The common law is a highly complex body of law, derived from various sources and administered by competing courts. This common law—which was also the common law of America in its major aspects[68]—was a body of kingdom-wide judicial customs, but a considerable number of these customs were those that England was believed to share with the entire civilized world.

After his introduction, Judge Blackstone begins with the "ab-

62. *Id.* at 67.
63. *Id.*
64. *Id.* at 68.
65. *Id.* at 74.
66. *Id.* at 79.
67. *Id.* at 83.
68. *See generally* W. CROSSKEY, *supra* note 6, at 578-640.

solute rights of individuals." The final cause of the law is to insure peace and security, and the most efficient means to obtain this end is to avoid tyranny through the enactment of laws that maximize the liberty of individuals and limit the power of government. "[T]he true liberty of the subject consists not so much in the gracious behavior, as in the limited power, of the sovereign."[69] On the other hand, there must be a prudent balance of "our rights and liberties" because "anarchy [is an even] worse state than tyranny itself."[70] Thus, good government requires a bill of rights, a law of *habeas corpus*[71] and a due process guarantee[72] to protect the three natural rights of the individual: life, liberty, and private property.

One of the most troublesome points of contention in American constitutional law is the meaning of due process. Here again, Judge Blackstone is helpful. In 1786, Alexander Hamilton observed that "the best commentators" explain that "law of the land"[73] means "*due process of law,* that is, *by indictment or presentiment of good and lawful men,* and trial and conviction in consequence."[74] In other words, there is no requirement that any particular "process" be followed. It is simply a requirement that the process of the courts, that process required or appropriate according to statutory or decisional law, be followed by all agencies of government. One should not be surprised to learn that the "best commentators" included Coke and Blackstone.[75]

The remainder of Volume I addresses the legitimate scope of constitutional power properly delegated to the legislature, the executive, the bureaucracy, the clergy, the military, the corporation, and the individual. Here Blackstone notes that while there may be several model constitutions, the English constitution is worthy of especially careful study because it had prevented both tyranny and anarchy for several hundred years.[76]

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69. 4 W. BLACKSTONE, *supra* note 1, at 426.

70. 1 W. BLACKSTONE, *supra* note 1, at 123.

71. *Id.* at 124.

72. *Id.* at 130.

73. "[N]o Member of this State shall be disfranchised, or deprived of any of the Rights or Privileges secured to the Subjects of this State, by this Constitution, unless by the Law of the Land, or the Judgment of his peers." N.Y. CONST. art. XIII.

74. THE WORKS OF ALEXANDER HAMILTON 231-32 (1904) (emphasis in original).

75. 1 W. BLACKSTONE, *supra* note 1, at 129-30.

76. "At some times we have seen [the absolute rights of every Englishman] depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy. . . . But the vigour of our free constitution has always delivered the nation from these

Once again, Blackstone's discussion of the inherent powers of the executive is useful to the student of American constitutional law. Article II of the United States Constitution vests the executive power in a President, without defining that power.[77] Blackstone describes the very broad powers of the King, using words that appear in the Constitution of the United States.[78] Viewed against the background of English practice, as described by Blackstone, the grants of power found in article II can be seen as actual limits on that power. For example, Blackstone states that the authority of the executive includes the power to command, to govern, to enlist, to raise and to regulate the army and navy.[79] The Framers of the Constitution, however, after reading Blackstone, granted only the power to "command"; thus, the other powers of the executive as "generalissimo" are by implication denied. Blackstone also states that the executive is the "fountain of honour, of office, and of privilege";[80] that the executive has the power to regulate commerce, including the right to grant monopolies;[81] that the executive is the "fountain of justice," who "has alone the right of erecting courts of judicature" and has the right not only to prosecute all offenses but ultimately to adjudicate such offenses;[82] and that the executive branch is a "constituent part of the supreme legislative power."[83] That the Constitution of the United States explicitly circumscribes these powers or actually transfers them to the other branches of government shows that the Framers intended to reduce the power of the executive branch *vis-à-vis* the legislative and judicial branches of government.

Volume II, "*Of the Rights of Things,*" is in second position after the discussion of the "rights of persons" because only those regimes which protect private property can protect the civil liberties of individual human beings against tyranny, and because holding property in common as in the state of nature results in "confusion."[84] The common good is best provided for when only "a part

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embarassments, and [has restored] the ballance of our rights and liberties . . . . " *Id.* at 123.

77. U.S. CONST. art II.

78. *See* 1 W. BLACKSTONE, *supra* note 1, at 183, 246, 249-50, 259.

79. *Id.* at 254.

80. *Id.* at 261.

81. *Id.* at 263.

82. *Id.* at 257.

83. *Id.* at 253.

84. 2 W. BLACKSTONE, *supra* note 1, at 11.

. . . of society . . . provide, by their manual labour, for the necessary subsistence of all; and leisure [is] given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science."[85] Because of its inability to provide sufficiently for commerce, feudal society, with its restrictive rules of land tenure, eventually was replaced by a vigorous commercial system which guaranteed private ownership. "[E]xperience hath shewn, that property best answers the purposes of civil life in commercial countries, when it's transfer and circulation are totally free and unrestrained."[86]

Judge Blackstone finds English law well suited—but far from perfect—to serve this common good. There are notable defects in the law of trusts and contracts. Thus, his concerns extended to the free alienation of most property and to the implementation of an effective system for recording conveyances.[87]

But Blackstone's discussion of the law of primogeniture shows that he recognizes that commerce is not the most important end of the laws that regulate property.[88] Here Blackstone differs from Mansfield. The English laws of property—as medieval and unfair as they may seem at first glance—play an important role in Blackstone's political theory. It is by means of these very laws, Blackstone hopes, that England will endure and avoid the fate that befell the great republics of antiquity, especially Athens, which resembled England in many respects. In England a father may not devise his "real" estate to all of his children. Rather, descent follows the rule of primogeniture. If the owner has no direct heirs, his land goes to the collateral relations. And if there are no collateral relations, the estate escheats to the crown. Originally, ancient Athens followed the "English" rule, but when Solon deivated from this rule by permitting (though only on failure of issue) disposition of land by testament and away from the collateral heirs, this soon produced an excess of wealth in some, and of poverty in others; which by a natural progression, initially caused popular tumults and dissensions, and ended at length in tyranny. Blackstone teaches that it is more important to keep the estate in the family and unified under the control of the oldest brother, to keep the

85. *Id.* at 8.
86. *Id.* at 288.
87. *Id.* at 342-43.
88. *Id.* at 200-62, 373-75.

family together and to control the accumulation of wealth, rather than to allow free conveyance of land—even though free conveyance means greatly increased land values and commercial prosperity. This is the case because a large land-owning class of educated gentlemen is the strongest safeguard against tyranny—of either the monarchical or the popular variety. Blackstone's doctrine of property is an elaboration of his doctrines of the superiority of mixed regimes and of the laws of human nature set forth in Volume I.

In Volume III, *Of Private Wrongs,* Blackstone summarizes English tort law and civil procedure, combining the two in a way that is foreign to current American doctrine. The long list of interesting topics in this volume includes discussions of equity and of legal fictions. Blackstone's critical and reforming attitude toward English law is more evident here than in the preceding volumes, which are addressed to a wider audience.

Blackstone first deals critically with one of the most perplexing aspects of the common law: the irrational split between law and equity. Aristotle says that, in general, there is a difference in principle between the two; while both are designed to effect justice, law consists of rules of general application, whereas equity is the rectification of law when the law is unjust in application because of its generality.[89] Justice Joseph Story, however, the most scholarly man yet appointed to the Supreme Court, stated that in Anglo-American law, "equity" is merely that which courts of equity administer, and "law" is that which courts of law administer.[90] In other words, there is no difference in principle between "law" and

89. "[W]hen we think the matter out, it seems strange that the equitable should be praiseworthy if it is something other than the just. If they are different, either the just or the equitable is not good; if both are good, they are the same thing. . . . The source of the difficulty is that equity, though just, is not legal justice, but a rectification of legal justice. The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement. . . . And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality." ARISTOTLE, NICOMACHEAN ETHICS, at lines 1137b2-b26 (H. Rackham trans. 1975).

90. J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 24-25 (1836).

"equity"; the division is an historical accident and serves no useful purpose, although the division still survives in attenuated form in American law.[91]

Blackstone, instead of attempting to apologize for this aspect of the law, agrees with Story in deploring the division, and deploring the fact that the two courts follow rules of decision that in many cases are not only different but conflicting. Under this strange system, a plaintiff might win in a court of law only to see the defendant enjoin the plaintiff's enjoyment of his judgment in a court of equity. Another plaintiff who would have been denied his recovery in a court of law could sue successfully in a court of equity, which might not recognize the defendant's merely "legal" defense. Blackstone explicitly terms this anomaly a "solecism," an impropriety and a mistake:

> It were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim, that equity follows the law; and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. . . . And sure there cannot be a greater solecism, than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.[92]

So, as Blackstone describes it, there is no substantive difference between the laws administered by the two systems.[93] For example, the law of contracts of deposit and bailment can be very similar to the law of trusts. Perhaps this "pretense" is why Blackstone relegates his discussion of courts of equity to the last chapter of the volume, a position that does not reflect the importance of these courts in the English constitution. Blackstone's critical argument concerning the division between "law" and "equity," and his call for a merging of the two, was intended to supplement the contemporary labors of his friend, Lord Mansfield, the Chief Justice of the King's Bench. Together they made a considerable impression

91. *See* Holmberg v. Armbrecht, 327 U.S. 392 (1946).
92. 3 W. BLACKSTONE, *supra* note 1, at 441.
93. *Id.* at 452-53.

on American readers.[94] The United States followed Blackstone rather than the English model he describes. He was instrumental in effecting this major reform of the law, and he did so in such a way as to avoid undermining the entire edifice of English law.

Blackstone's critical disapproval of many English practices is not limited to mere subtleties.[95] He criticizes the clerks in the high court of chancery for being "too much attached to ancient precedents" when they declined to expand the courts of law to serve all the purposes of the courts of equity.[96] There are many other examples of Blackstone's critical attitude toward English law.[97]

After censuring the law/equity dichotomy, Blackstone defends the odd "string[s] of legal fictions"[98] that were present in the English law of his day. He recognizes that they are "troublesome" and "may startle the student,"[99] but he also finds that they are necessary and beneficial given some of the peculiarities of English law. The Court of the King's Bench took important tort cases out of the decentralized and confusing county courts by pretending that all defendants who had been arrested were arrested for a trespass and that they were unable fairly to defend themselves against the nonexistent accusation of trespass.[100] There are several other such fictions in English law.[101] In all the cases Blackstone presents, justice was done by the legal fiction. In fact, the *Commentaries* state

94. Blackstone's critique of English law was cited and relied upon in the Senate of the United States, during the drafting of the Judiciary Act of 1789. *See* JOURNAL OF WILLIAM MACLAY 92 (E. Maclay ed. 1890).

95. Such subtleties in the text have misled some recent commentators, who believe Blackstone's purpose is "uncritically" to record English customs in all their particularity, to conclude that Blackstone is "shockingly wrong." Langbein, *Introduction* to 3 W. BLACKSTONE, *supra* note 1, at vii. The twentieth-century reader is busier than his eighteenth-century counterpart, so he is less likely to have the leisure necessary for careful reading.

96. 3 W. BLACKSTONE, *supra* note 1, at 51.

97. For example, Blackstone criticizes the rules of law which say that a father shall never immediately succeed as heir to the real estate of his sons, and that land descending to an heir shall not be liable to simple contract debts of the devisor, although the money was laid out in purchasing the very land. "[I]n both these instances the artificial reason of the law, arising from feodal principles, has long ago intirely ceased." *Id.* at 430.

98. *Id.* at 203.

99. *Id.* at 43.

100. *Id.* at 42.

101. For example, it is desirable that all commercial contracts be regulated by a uniform law, the common law. However, admiralty law is based more on Roman law than on the common law. So the courts pretend that contracts made at sea to be performed in England were made at the royal exchange in Cornhill. *Id.* at 107. Also, leaseholders' actions were often appropriated by the courts which were supposed to try titles to freehold land.

that there is an unwritten rule that these fictions will be used only to work substantive justice. "[N]o fiction shall extend to work an injury; its proper operation being to prevent a mischief."[102]

Why not simply change the underlying law that causes the problems which the fictions are used to avoid—as would be done without hesitation in the United States? To answer this question, Blackstone gives us his famous Gothic castle metaphor:

> We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience, are cheerful and commodious, though their approaches are winding and difficult.[103]

Blackstone here is saying explicitly that he is quite aware that English law has its roots in feudal customs and that a large part of it had become quite "useless." If one is to live in a Gothic castle, however, what does one do with the "useless" parts of the edifice? If they are torn down, the inhabited portion of the castle may very well be severely undermined. Since the law is necessary for the liberty and civil rights of all persons as well as for peace and prosperity, the risk from fundamental changes in the law is considerable. Blackstone argues for "fitting up" the castle, not for "fanciful alterations and wild experiments."[104]

In Volume IV, *Of Public Wrongs,* Blackstone discusses criminal law and procedure and teaches that all persons have free will and are therefore responsible for their actions. In fact, a defect of will is part of the definition of what is a crime. Though there should be proportionality between crimes and their punishments, natural law does not provide "any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform rule; [therefore,] they must be referred to the will and discretion of the legislative power."[105] In other words, there is no natural basis for "substantive due process." Moreover, Blackstone agrees with modern scholars who teach that "prevention" of crime, not "retaliation" is the proper purpose of the criminal justice system[106]

102. *Id.* at 43.
103. *Id.* at 268.
104. *Id.* at 60.
105. 4 W. BLACKSTONE, *supra* note 1, at 14-15.
106. *Id.* at 12.

and that the certainty of punishment, not its severity, is more important in serving this purpose.[107] In some cases, law and morality are separate considerations. Some crimes are *mala in se,* while others are merely *mala prohibita,* "in themselves nothing criminal, but . . . made so by the positive constitutions of the state for public convenience."[108]

As with his discussion of "equity," Blackstone seeks to reform the law of public wrongs. He describes many cases of minor injustices, such as the anti-Catholic laws, which were considered necessary at one time but which became dangerous and which (he counseled) should be abolished entirely, and the anti-gypsy laws, which were no longer enforced.[109] Blackstone's principal quarrel with English criminal law is that he considers sentences too severe. "This strictness is grown to be a blemish and inconvenience in the law, and the administration thereof."[110]

For the many who might become unreasonably disaffected with the law upon reading about such injustices, Blackstone teaches that the medieval and barbarous disproportionality and severity of much of the English criminal law is a problem only on paper, because such laws are "seldom exerted to their utmost rigor."[111] Moreover, the King is often invited by the courts to exercise the executive pardon. However, for those who read more closely, Blackstone does not pretend that these devices solve the problem. "[I]ndeed if they were [fully enforced] it would be very difficult to excuse them, [for] they are rather to be accounted for from their history . . . . "[112] Blackstone advocates some reform but reminds the reader that there should be no attempt to reform radically the law of England because flaws are inherent in a system

107. *Id.* at 16-17.

108. *Id.* at 42.

109. *Id.* at 56-57.

110. *Id.* at 369 (quoting Sir Matthew Hale). Blackstone describes a law that imposed the death penalty for all larcenies over twelve pence which had been the standard in the time of King Athelstan, eight hundred years earlier. The intervening period of inflation caused "the life of a man [to] continually grow cheaper." But, as one would expect of the English, everyone knew to refrain from enforcing this law, and juries pretended that the value of stolen property was less than it actually was. *Id.* at 238-39. English law also permitted the death penalty for all felonies, including the theft of a handkerchief out of someone's pocket, the theft by a servant from his master, and treason which included the seduction of the queen. *Id.*

111. *Id.* at 56-57.

112. *Id.* at 57.

of common law instead of a neat code handed down by an emperor. The common law is peculiarly conducive to the growth of free government, because only the common law fully respects the custom or opinion of the community as law.

Volume IV also describes a questionable law which Blackstone does not seek to reform. He presents a discussion of freedom of the press, saying that this politically important freedom is adequately protected by laws that prohibit previous restraint upon publications. To teach that the press may print any libelous, provocative or criminal matter whatsoever is to confuse liberty with licentiousness, and thereby to place true liberty in jeopardy.[113]

The above is a very brief sketch of Blackstone's *Commentaries*. In order to understand any work of this kind, the reader must ask three questions: What does the author say? Is what he says true? Is it good for the politics broadly understood?

Are Blackstone's teachings true? Is he merely a product of his age, simply a writer of historical interest, or is he a wise teacher of jurisprudence for thoughtful persons in all times and places? The former position is the conventional academic opinion, held by John Austin,[114] Daniel Boorstin,[115] Jeremy Bentham,[116] Thomas Jefferson,[117] and the four authors of the introductions to the new edition

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113. *Id.* at 150-53.

114. John Austin, the founder of the school of "legal realism," attacks Blackstone for not being a positivist. J. Austin, *The Province of Jurisprudence Determined* (1832), 1 LECTURES ON JURISPRUDENCE, 1861-1865 (1879).

115. DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE (1941). Boorstin was influenced by Jefferson.

116. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT (J. Burns & H. Hart ed. 1977).

117. "In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the despot. . . . [But] with the lawyers it is a new thing. They have, in the mother country, been generally the firmest supporters of the free principles of their constitution. But there too they have changed. I ascribe much of this to the substitution of Blackstone for my Lord Coke, as an elementary work. In truth, Blackstone . . . [has] made tories of all England, and [is] making tories of those young Americans whose native feelings of independence do not place them above the wily sophistries. . . . [This book has] done more towards the suppression of the liberation of man, than all the millions of men in arms of Bonaparte and the millions of human lives with the sacrifice of which he will stand loaded before the judgment seat of his Maker. I fear nothing for our liberty from the assaults of force; but I have seen and felt much, and fear more from English books, English prejudices, English manners, and the apes, the dupes, and designs among our professional crafts." Letter from Thomas Jefferson to Horatio G. Spafford (March 17, 1814), 14 THE

by the University of Chicago Press. The latter position, because of the advance of the former, is today the less orthodox.[118] To decide which position is correct, we should examine a few of the teachings mentioned above.

1. Is it true that all legitimate government rests ultimately upon the "consent of the people"?[119] Americans surely believe this teaching; it is one of the "self-evident truths" in their Declaration of Independence.

2. Is it true that there is "natural justice" and that it entails a higher obligation than do the laws of men? In the *Republic*,[120] Socrates' opponent, Thrasymachus, denies natural justice and says that law is whatever the rulers say it is.[121] The modern Thrasymachus is the lawyer attracted to the power promised by the rhetorical devices of legal realism.[122] Austin dogmatically asserts in his attack on Blackstone that there is no such thing as natural justice, and that if there were, it would not be law. However, it has been pointed out that:

> [t]he crucial defect in American Legal Realism is that it stops at the courthouse door. It has no meaning for either an advocate or a judge. The judge trying to decide a case will not be helped by the reflection that the law is anything he says it is, nor will the

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WRITINGS OF THOMAS JEFFERSON 118-29 (1905).

Jefferson even strove to give an anti-Blackstonian impulse to the influential faculty of law on the founding of his University of Virginia: "In the selection of our Law Professor [for the University of Virginia], we must be rigorously attentive to his political principles. You will recollect that before the Revolution . . . our lawyers were then all Whigs. But when . . . the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. . . . It is in our seminary that that vestal flame [Whigism] is to be kept alive; it is thence it is to spread anew over our own and the sister States. If we are true and vigilant in our trust, within a dozen or twenty years a majority of our own legislature will be from one school, and many disciples will have carried its doctrines home with them to their several States." Letter from Jefferson to James Madison, (February 17, 1826), 16 THE WRITINGS OF THOMAS JEFFERSON 155-59 (1905).

118. *See, e.g.*, Herbert Storing, *William Blackstone*, in HISTORY OF POLITICAL PHILOSOPHY 536-48 (I. Strauss & J. Cropsey ed. 1963). *See also* G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 5, 20, 66, 94-96, 103-05, 112-14, 125, 144, 187, 207, 209, 212, 237, 424-25, 432-33, 439, 441, 457-58, 461, 471, 479, 495, 499, 500-02, 508-09, 512-13, 515, 518, 528-29, 531-33, 539, 560, 563, 568, 572, 577, 588-89, 598, 600, 611, 624, 641, 659, 665, 671, 673, 684, 688, 695, 716, 723, 760, 762, 794, 796 (1971).

119. *See* note 62 and accompanying text *supra*.

120. *See* PLATO, REPUBLIC, at lines 336b-47e.

121. *Id.*

122. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

lawyer serve his clients' cause by arguing it in these terms.[123]

How is the judge to decide what is just without reference to the immutable laws of human nature? And how is the legislature to decide which laws to pass? The question of whether or not law or justice is natural is clearly beyond the scope of this review. The classical formulation of natural justice is "equal to equals, unequal to unequals."[124] Whether or not there is natural law, there is no doubt that belief in natural law or natural justice has had a salutary effect on the evolution of the common law. The common sense of English jurisprudence results from the teaching that one cannot understand the law without understanding nature and natural justice.[125]

3. Is it true that in all forms of government there is one supreme power? Is not the United States an example of the separation of the supreme federal power, with the three branches balancing one another? Only one branch of government has the ultimate power of impeachment. Congress has the power to impeach all members of the other two branches if it so chooses. The other two branches in concert, however, cannot dissolve Congress against its will. So it is clear where the ultimate power lies, even in this most difficult case.

4. Is it true that anarchy is worse than tyranny?[126] If so, the prudent founder would prefer to err in the direction of tyranny. Under a tyranny, such as that of Nazi Germany for example, poetry and philosophy may continue in secret, and science may prosper. In an anarchy, such activities, which require leisure and the division of labor, would be impossible.

5. Is Blackstone right to say that liberty of the press—which "is indeed essential to the nature of a free state"[127]—is adequately protected by laws which permit criminal penalties for malicious libel? Libel includes any "malicious" defamation of any person, but especially of a politician. Moreover,

> it is immaterial with respect to the essence of a libel, whether the matter of it be true or false, since provocation, and not the falsity, is the thing punished criminally. Liberty of the press . . . consists

123. R. RODES, THE LEGAL ENTERPRISE 20 (1976).
124. ARISTOTLE, POLITICS, at lines 1282b20-b24 (H. Rackham trans. 1932).
125. *See* notes 42-57 and accompanying text *supra*.
126. *See* notes 69-72 and accompanying text *supra*.
127. 4 W. BLACKSTONE, *supra* note 1, at 151.

> in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.[128]

The Supreme Court of the United States has badly misunderstood the First Amendment, if Blackstone is correct. Repressive laws are "necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment."[129] If it is generally agreed that freedom of the press does have the great importance Blackstone attaches to it, then it is peculiar that Blackstone does not recognize the thoroughly chilling effect on freedom of the press which laws against malicious libel would have if they were enforced. If the will of the individual citizen is "free" in a country where he can be severely punished for saying a truth which embarrasses any public official, then he is also "free" in any totalitarian regime. It is true that in such a regime, one is free to think anything one pleases, as long as one does not communicate it to others. However, this "freedom" is not the political freedom Blackstone teaches. It is transparently fallacious to say that because liberty depends on order, repression in the name of order necessarily promotes true liberty. Repression has this effect only if the ruler is wise; and as Blackstone points out elsewhere, we should not make laws assuming this will be the case.

6. Is it true that liberty consists not so much in the gracious behavior as in the limited power of the sovereign?[130] This is the teaching of the *Federalist*[131] and there is probably no one phrase which better sums up the American experience. The decline of Britain in the twentieth century can be attributed to the accumulation of almost tyrannical power in one branch of government—just as Blackstone, through the intermediation of Montesquieu, predicts.[132] England remained strong only as long as it followed Blackstone's and Aristotle's teachings about the superiority of the mixed regime.

7. Are legal fictions respectable in the law?[133] Anyone who

128. *Id.* at 150-51.
129. *Id.* at 152.
130. *Id.* at 426. *See* notes 69-72 and accompanying text *supra.*
131. THE FEDERALIST Nos. 39-41 (J. Madison).
132. 1 W. BLACKSTONE, *supra* note 1, at 157.
133. *See* notes 98-104 and accompanying text *supra.*

has studied the decisions of the United States Supreme Court cannot fail to notice that that body has outdone the old common law in inventing legal fictions to effectuate the principles contained in the Constitution whenever substantive justice seemed to require it.[134] Bentham, in his attack on Blackstone, says that legal fictions are to the law as lies are to the truth.[135] But this misses the point. Fictions are not intended to deceive, but rather to work substantive justice.

8. Is Blackstone correct when he teaches that one must be more careful when reforming the law than when reforming other institutions? Is there a presumption in jurisprudence against "alterations and experiments"? Most American legal scholars have rejected Blackstone's teachings about natural law and human nature, and have thereby rejected the allied presumption against experiments. For example, Daniel Boorstin,[136] in his attack on Blackstone, follows Jefferson[137] in ridiculing as dishonest and ideologically conservative Blackstone's rebuttable presumption against reform of the law. However, as Aristotle points out in the *Politics*, to change the law may be harmful even if the changes are in themselves improvements, because laws that change frequently are not respected as true law.[138] Furthermore, in Blackstone's Gothic castle, as Professor Herbert Storing concludes, the new and comfortable apartments

> cannot provide for themselves that magnificence and venerability with which their own outer walls must be reinforced if the modern edifice is to stand. The Gothic labyrinth of hierarchy and duty, to which Blackstone provides the key, is the indispensable means to the regulation and thus the preservation of human equality and individual rights.[139]

From the above, one can see that, in spite of a few serious but

134. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Brown v. Board of Educ., 347 U.S. 483 (1954); Screws v. United States, 325 U.S. 91 (1945).

135. *See* note 116 and accompanying text *supra*.

136. *See* note 115 and accompanying text *supra*.

137. As Professor Corwin has noted, Jefferson had no high regard for Blackstone. Noting their tendency toward Toryism, Jefferson called "Blackstone lawyers" "ephemeral insects of the law." Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 405 n.27 (1928), *quoting* 11 T. JEFFERSON, WRITINGS iv (Mem. ed. 1903).

138. ARISTOTLE, POLITICS, at lines 1268b23-69a28.

139. Storing, *supra* note 118, at 546.

quite peripheral mistakes, the main body of Judge Blackstone's teachings ring true. Moreover, there is an "eerie relevance"[140] of Blackstone's teachings to the student of American law, especially constitutional law. In several respects, Blackstone's work is more relevant today to the United States than it is to England. Americans should not be surprised to learn that for their greatest statesman, Abraham Lincoln, the *Commentaries* were both law school and law library.[141]

140. Langbein, *Introduction* to 3 W. BLACKSTONE, *supra* note 1, at iv.
141. 4 COLLECTED WORKS OF ABRAHAM LINCOLN 121 (R. Basler ed. 1953).